No. 3988

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. DALY, *Appellant,*

vs.

C. W. LONG, *Appellee.*

BRIEF OF APPELLANT

On Appeal from United States District Court for the District of Idaho, Southern Division

WILLIAM HEALY,
Solicitor for Appellant.

Filed *1923*

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STATEMENT OF THE CASE

This action was brought by the plaintiff, J. W. Daly —appellant here—to quiet his title as against the defendant in five unpatented quartz mining claims and an attendant mill site, located near Silver City, in Owyhee County, Idaho. The title of the plaintiff is conceded to be good, except as it may be affected by a contract entered into between the parties (Trans. p. 26) which contract appears in the agreed statement of the case.

The plaintiff Daly lives near Silver City. The defendant and appellee, Long, lives near Baker City, Oregon. Both men are in the class of ordinary prospectors and miners, without considerable financial resources.

On June 24, 1918, Daly and Long entered into a written contract, executed at Baker City, under which it was contemplated that Long would acquire a half interest in the Daly ground (Trans. pp. 13-21). An examination of the terms of this contract is important at this point. After reciting the ownership of the ground by appellant, the agreement avers that Long desires to acquire a half interest therein. The consideration for the half interest to be acquired by Long is the performance by him of certain labor and services in sinking a shaft and in running two cross cut tunnels from the shaft to the vein and in drifting on the vein from these cross-cuts. Daly and Long are each to do or cause to be done one-half of the necessary labor. It is stipulated that Long shall begin such work not later than October 1, 1918, provided that in the event of unforeseen contingencies Long shall have until October 1, 1919, to begin such work. It is agreed that the labor to be done by Long and his incidental furnishing of equipment and supplies shall be deemed the consideration for the half interest to be acquired by him, and it is also provided that the interest shall not be transferred until the contract has been performed by Long, the deed to be placed in escrow. The parties agree that the "fiscal" year for the prescribed development of the property shall begin October 1 of

each year and that at least six months work shall be done during each such year.

It is plain that the parties intended that Long should acquire no interest in the property until the performance of his contract, and the time within which he must commence performance is clearly set forth. In the event Long should default in any one or more of the provisions of the contract by him agreed to be observed, it is provided, in substance and effect, that his rights under the contract shall at once terminate. While Daly is bound to perform one-half the work and to furnish one-half the necessary equipment and supplies, the laboring oar is nevertheless with Long. There is a provision in the agreement to the effect that if either party shall fail or refuse to perform the work or to furnish the materials, it shall be optional with the other to carry on the enterprise, in which case the party in arrears shall pay "the reasonable and proper price" for such party.

It will be observed that the contract is incomplete in an important, and in our view a vital particular. The means to be employed in the doing of the work are not specified. As will be seen upon examination of the correspondence incorporated into the record, this lack of definite understanding relative to the methods to be employed furnishes a note of discord in all the subsequent negotiations of the parties.

Long at no time went on the property. He did not perform, or commence performance of his undertaking. (Trans. p. 46.) The bulk of the evidence in the case consists of letters exchanged between the parties, Daly

writing from Silver City and Long writing from Baker City (Trans. pp. 26-45).

The first year, commencing with October 1, 1918, seems to have been passed over by mutual consent. Contemplating the approach of October 1, 1919, at which time it was provided that he must commence work at all events, Long on August 14, 1919, wrote to Daly from Baker, the letter being made up mainly of inquiries (Trans. p. 32). This letter seems to have been taken by Daly as a declaration of intention on Long's part to commence work, as agreed. He states in his reply (Trans. p. 33), and also testified upon the trial (Trans. p. 47), that he at once commenced to clean out the lower tunnel, that being the location of the winze in which the work was to be done. In his reply letter written at once upon receipt of the communication from Long, Daly answers the inquiries and closes by expressing a desire to know what day Long is coming.

On September 19 following, Long writes, again making inquiries, and stating that if it suits Daly not to commence work, that he should give Long something to show that "these arrangements" are satisfactory, and Long would record it (Trans. p. 33). Not receiving an immediate reply to this letter, Long on September 30 wrote Daly to the effect that he is ready to fulfill his agreement, stating "Providing you wish to commence work October 1 you can put on a man and I will pay the bill." A copy of this letter was sent to the County Recorder (Trans. p. 35). Meanwhile, on September 26, Daly had responded, stating in his

reply: "You state in your letter that your affairs are not in shape for to permit you to start work on my claims this winter * * * There is only one reason why I am so anxious to work the property at an early date, is the condition the tunnel is getting in. I have put in two months' work on the claims this summer, and expect to put in two more months before the snow flies * * * It is not a matter of assessment work with me. It is the object of developing pay ore." (Trans. p. 34).

Upon receipt of the letter from Long, a copy of which had been sent to the County Recorder, Daly, on October 13, 1919, wrote to Long, stating: "I will give you an extension of time to carry out the agreement * * * In regard to the extension of the agreement, I will wait until we can meet if you cannot come up here" (Trans. p. 36). To this letter Long made no reply until almost four months later, and the correspondence which then ensued (Trans. pp. 36-39) evidently influenced the Trial Court very strongly in arriving at his decision.

It is apparent from an examination of this correspondence that Daly resented the failure of Long to reply to his letter of the previous October. It also appears here and elsewhere in the correspondence that Long considered the installation of electric power as desirable in the doing of the work. Daly does not readily fall in with this idea because of heavy expense and because of the meagre finances of the parties. In his letter of September 26, 1919 (Trans. p. 35), Daly writes: "I look at the proposition this way. If

we have to install machinery, and especially electric machinery, it will be a heavy expense for both of us." In his letter of February 9, 1920 (Trans. p. 37), he states: "I have come to the conclusion that this proposition is too expensive for workingmen like us with only our limited capital behind us."

In the letter last mentioned Daly endeavors to persuade Long that it would be to the advantage of both mutually to abandon the contract. But in his reply to this letter (Trans. pp. 38-39) Long flatly refuses to do anything of the kind and declares his intention of preserving his rights and of proceeding with the contract. He further states: "Possibly you think best not to install machinery at the present time, which possibly would be best, but this does not keep us from doing hand work and going right ahead and sink."

About the time of this correspondence, in February, 1920, the two had a telephone conversation in which Long asked about the feasibility of going to work on the property at that time, and Daly advised that it would be impossible to get in with the necessary supplies on account of the deep snow on the mountain (Trans. p. 46).

This flareup between the parties in February, 1920, seems to have spent itself and to have become dissipated by the mutual interchange of views, and when the correspondence is resumed in July, 1920, complete harmony prevails.

Daly's statement in October, 1919, that he would give Long an extension, was treated and considered by both parties as a year's extension of the time within

which Long must commence work (Trans. p. 48). With this time limit in view, Long on July 12, 1920, wrote Daly that he would shortly be over; that he thought it best to install a jackhammer outfit, "and if you are not able to carry your part, I will try and install the outfit so we can get started, and you can pay for your part when you get able to take care of it. * * * I have confidence in your property and intend to live up to my part of the agreement, and I will help you to live up to your part." (Trans. p. 40.)

To this letter, on July 21, Daly replied (Trans. p. 41). The letter is dated 8/21/20, but internal evidence and also Long's answer to it prove it to have been written in July. In this letter Daly speaks optimistically of the enterprise and looks forward to Long's arrival. He says, "The tunnel is in as good shape as it was last year. I think two men would put it in good shape in three weeks or a month." He readily falls in with Long's proposal to install a jackhammer outfit and says: "They have changed management of the Florida Mountain Company since I spoke for power. They might permit us to hook on to the Black Jack transformer." Replying to Long's proposal to give him time to pay for his share of the machinery which Long desires to install, Daly writes: "If you are willing to put up my share of installing the machinery I will require a written agreement when I shall pay my share."

Fearful, as he states in his oral testimony (Trans. p. 49), that the usual knockers in the camp would talk down his property, Daly urges Long not to talk about his business with anyone, but to come straight to the property.

Following upon this exchange of letters in July, 1920, Daly went to work, as he had done the previous year, to clean out the tunnel and to get ready for Long's coming. On October 1, he was on the ground ready to go to work, as he had done on the appointed day of the previous year (Trans. p. 47). On September 27, 1920, Long by registered letter wrote from Baker, in substance and effect, that he was unable through lack of money to commence work as agreed (Trans. pp. 42-43). He writes: "However, if you want to work there this winter, go ahead and put on a man and hire him as reasonable as you can and start in October 1, and send in the bill to me at Baker, and I will pay my part, according to my agreement with you, which is on record. * * * And in case you don't want to work there you can give me an extension of time and I will file same." He also inquires how much he is going to owe Daly for assessment work. Evidently as an inducement to Daly to grant him an extension of time, he states: "I am confident by early spring will be able to make a turn * * * (If so) I will install a power plant for hoisting and drilling and I will make you a present of a half interest in same."

This letter seems to assume, as did the other written the previous autumn, a copy of which was sent to the County Recorder, that Daly was under obligation to hire a man in Long's stead and to accept, in lieu of performance, Long's promise to pay the man's wages.

To this letter Daly replied (Trans. pp. 43-44) on October 2, 1920: "I am real sorry you were unable to make a deal * * *. I do not want to stay here this winter because I am not prepared to do the work

I want to do. As to hiring a man, I cannot work him to advantage. I am through with the assessment work, but I am still working in the lower tunnel. * * * I consider that you do not owe me anything for assessment work. If we ever got started to do anything I would have that much coming to my credit. *I do not want to grant you an extension of time on the present agreement.* It will be time enough when you are ready to commence work. *I will give my reason. Somebody might want an option, a lease, or a bond. I could not give either if the property is tied up.*"

Thereafter Daly continued work on the property until the middle of November (Trans. p. 48). Long did nothing. He did not even reply to Daly's letter.

In May, 1921, Long learned that good ore had been encountered in or near the Daly property. At once, and for the first time, he hurried to Silver City. There he spent a part of a day and one night and then returned to Baker (Trans. pp. 53-54). He testified that while in Silver City he learned at the office of the County Recorder that Daly had given a bond on the property to the Banner Mining Company, and that the contract bore the date of January 6, 1921 (Trans. pp. 51-52).

Of this trip to Silver City he gave Daly no notice, either before or after (Trans. p. 54). On June 28, 1921, he wrote Daly from Baker referring to the contract with the Banner Mining Company and asking how his interests in the property have been protected (Trans. p. 45).

Thereafter Daly commenced this action in the Idaho Court. The cause was removed to the Federal Court on application of the defendant, on the ground of diversity of citizenship. The case was tried in September, 1922. It appeared on the trial that Long had never been on the property and had never done or caused to be done any work thereon, and that he had at no time furnished any supplies or equipment for the property, nor had he ever paid Daly any money on account of assessment work or otherwise (Trans. pp. 47-48).

The Trial Court entered a decree in which it was adjudged that the defendant "Has not forfeited any rights or interest acquired by him in and to the mining claims, premises and property described in the bill of complaint herein, under the agreement between plaintiff and defendant, dated June 24, 1918", and it was further ordered and decreed "That plaintiff's bill of complaint for a decree quieting his title to said premises and property being the same hereby is dismissed, each party to pay his own costs." (Trans. pp. 59-60). From this decree the plaintiff has appealed.

ASSIGNMENT OF ERRORS

I

The Court erred in holding as a matter of law that the plaintiff was not entitled to a decree quieting title to the premises described in the complaint, and in dismissing the bill of complaint.

This is a general assignment toward which the entire brief is directed.

II

The Court erred in holding as a matter of law that the agreement between the parties is a complete and valid contract, capable of being enforced by either party.

III

The Court erred in adjudging and decreeing that the defendant has not forfeited any rights or interest in and to the mining premises described in the complaint under the agreement between the parties, and in holding as a matter of law that the defendant acquired any right or interest in the property by virtue of the agremeent between the parties.

This is a combination of Assignments Nos. III and IV enumerated in the transcript. The two in reality constitute but one assignment.

IV

The Court erred in holding as a matter of law that the appellant waived performance on the part of the appellee of the terms of the contract between the parties concerning the development of the property in controversy.

Under this head Assignments Nos. II, V and VII, enumerated in the record, will be discussed, The three constitute but a single assignment and depend upon the question of waiver of performance.

ARGUMENT

II

The Court erred in holding as a matter of law that the agreement between the parties is a complete and valid contract capable of being enforced by either party.

As heretofore pointed out, the contract between the parties is incomplete in certain vital particulars. The method or means to be employed in the doing of the contemplated development work are not specified. At the inception of performance the parties are confronted by the question of the choice of means. Shall the work be done by hand drills, or shall power drills be installed? Shall the waste be hoisted by hand windlass or shall a gasoline hoist or an electric hoist be installed? These are vital questions upon which depend the outlay of money required. The contract leaves their determination to the future agreement or disagreement of the parties.

As a matter of fact, the parties never did reach an agreement on this subject. It is our contention, in as much as the contract remains wholly executory, that it is incapable, for the reasons given, of being enforced by either party. It cannot be made the subject of a decree for specific performance.

> Pomeroy Eq. Jur. (4th Ed.), Sec. 1405.
> Pomeroy Eq. Rem. (2nd Ed.), Sec. 2186.
> Stanton vs. Singleton, 59 Pac. 146.

Neither will it support an action for damages.

> Page on Contracts (1st Ed.), Secs. 27-28.
> 6 R. C. L., pages 617 and 644.
> 13 C. J. 264, Note 82.
> Weldon vs. Degan, 150 Pac. 1184.

The defendant, by virtue of the contract alone, has no interest in the title, nor can he acquire any interest

through the medium of a decree for specific performance. The contract, then, does not affect the title which plaintiff seeks to quiet in himself, and affords, therefore, even though still subsisting, no defense to the action.

Meyer vs. Quiggle, 74 Pac. 40.

III

The Court erred in adjudging and decreeing that defendant had not forfeited any rights or interest in and to the mining premises described in the complaint under the agreement between the parties, and in holding as a matter of law that the defendant acquired any right or interest in the property by virtue of the agreement between the parties.

The Trial Court seems to have proceeded upon the theory that the defendant, by virtue of the contract alone, acquired some equitable interest in the property. Carrying out this theory to its logical conclusion, it was assumed that the action was brought for the purpose of declaring or enforcing a forfeiture of that interest, or at least that such forfeiture would be the necessary result of a decree in favor of the plaintiff; and forfeitures not being favored in law, it was thought to be incumbent upon the Court to seize upon any possible circumstance in the case which might relieve the defendant from the forfeiture of his interest. That the Court's consideration of the evidence was colored by this assumption is manifest from the language of the decision. Indeed, this theory is reflected in the decree, for the Court not only orders a dismissal of the complaint, but formally adjudges and decrees that the de-

fendant "has not forfeited any rights or interest acquired by him in and to the mining claims" under the agreement with the plaintiff. This is not only a recognition, but is a solemn, if indirect, adjudication, of an undefined interest in the property on the part of the defendant. In this particular the judgment seems to us to be erroneous and highly prejudicial to the plaintiff.

1. There is in the contract between the parties no present grant of an estate or interest. The defendant, by virtue of the contract alone, acquired no interest, legal or equitable, in the mining premises. The plaintiff agrees to place a deed in escrow. The defendant agrees to perform certain labor in opening up the property. The consideration for the interest is not the *agreement* of Long to perform the services. The consideration to be paid for the interest is the *performance* of the services. The contract so provides in express terms.

Long's interest was to be earned by performance and was to vest only upon performance. Performance then, or at least commencement of performance, was by the parties made a condition precedent to the vesting of any interest in Long. Upon full performance by him his equitable estate would vest and he would then be in position to demand the conveyance of the legal title.

Failure to commence performance within the time expressly limited in the contract at once terminates it, so far as Long is concerned. The agreement so provides. Daly, upon the happening of such contingency, is given the right to treat the contract as at an end.

The fact that he may, in such case, have alternative, though wholly inadequate, remedies under the contract, does not affect the absolute right given him by the terms of the contract itself to treat it as terminated and abandoned.

2. It necessarily follows from what has been said that this action is not brought for the purpose of enforcing or declaring a forfeiture. If that were its purpose, there would be no need to bring it. The plaintiff has the legal title. He is and always has been in the exclusive possession of the property. Long has no title, legal or equitable. He is not and never has been in the possession of the property or any part of it.

The contract, however, is of record, and Long is asserting an interest under it. Considerations having to do with the sale of the property, as well as with the circumstance that the facts surrounding the transaction are apt to be dissipated by death or obscured by the lapse of time, all make it desirable and indeed necessary that suit be instituted in order that the cloud may be removed and any question concerning the propriety of defendant's claim may be determined and set at rest. The action is brought under the provisions of Section 6961 of the Compiled Statutes of Idaho, which is as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The complaint alleges in general terms the title and possession of the plaintiff, the assertion of some right

by the defendant, and prays that defendant be required to set forth the nature of his claim. (Trans. pp. 8-9.) In his counter-claim the defendant sets up the contract and asserts that it is still operative, performance having been waived or excused by the plaintiff (Trans. pp. 10-13). In his reply to the counter-claim the plaintiff admits the execution of the contract, but denies that it is still operative or that its performance has been waived (Trans. pp. 21-25). If the contract is still operative, it affords, perhaps, a defense to the action. Otherwise, it affords no defense. In determining that question in favor of the plaintiff, the Court neither declares nor enforces a forfeiture.

Nor is this one of that numerous class of cases in which the proceeding to quiet title is based upon a completed forfeiture, as where, upon breach of a condition subsequent, the grantor has, before suit, declared the forfeiture and effected a re-entry of the premises. There the forfeiture is present, though as an accomplished fact. Even in such cases Courts of Equity do not hesitate to grant relief to the complainant. As illustrations of this class of cases, see:

Big Six Development Co. vs. Mitchell, 70 C. C. A. 569, 138 Fed. 279.

Gadbury vs. Ohio Consolidated Gas Co., 62 L. R. A. 895.

Brewster vs. Lanyon Zinc Co., 72 C. C. A. 213.

Pendill vs. Union Mines Co., 31 N. W. 100.

Brown vs. Vandergraft, 80 Pa. 142.

Parsons vs. Smilie, 32 Pac. 702.

Maginnis vs. Knickerbocker Ice Co., 112 Wis. 385.

In Pendill vs. Union Mines Co., supra, where forfeiture of a leasehold was incurred by breach of a condition subsequent, the Court states:

> "The bill treats the lease as a void encumbrance, under which the defendant company, by its claims thereunder, clouds complainant's title. The Court is not asked to declare the forfeiture, but to ascertain whether or not a completed forfeiture exists, and if so to remove the cloud."

Similarly, in Big Six Development Co. vs. Mitchell, where a leasehold estate was likewise forfeited by breach of a condition subsequent, it is stated:

> "It is also urged that the bill cannot be maintained because it is a bill to enforce a forfeiture, and equity never lends its aid to enforce a forfeiture or penalty. But, as we understand it, the theory of the bill is not that, but is that the forfeiture was complete before the bill was filed, that the lease was dead, and that the defendant was threatening and was guilty of a continuing trespass. We think the bill may be maintained upon this ground."

In all cases of the above character there had been a present grant of an estate or interest which had become vested. The forfeiture of the estate occurred as the result of the breach of a condition subsequent. In the case at bar, there being no present grant, no estate or interest had become vested. There could under such circumstances be no forfeiture of it, either before or after suit.

Conditions precedent and subsequent are defined in 13 C. J. 565 (Note) as follows:

> "A condition precedent is one by the performance of which a right, estate or thing is obtained or gained; a condition subsequent is one by the performance of which a right, estate or thing already obtained is kept and continued."

No forfeiture can properly be predicated upon a breach of a condition precedent. There are, however, many cases where, though no interest has become vested, because of failure to perform a condition precedent, nevertheless the party failing to perform has already paid part of the purchase money or has parted with valuable property which has been received by the party asserting the breach, or where valuable improvements have been made which, upon breach of the condition, inure to the benefit of the promisee. Under such circumstances, although there can properly be no question of forfeiture, no estate having vested, nevertheless there are equitable considerations which sometimes impel Courts of Equity to find, upon slight evidence, that the breach of the condition has been waived or excused. But it is the general rule that Courts of Equity will not relieve against loss or forfeiture incurred by a breach of a condition precedent.

In Pomeroy's Equity Jurisprudence (4th Ed.), Par. 455, the rule is stated to be:

> "When the contract is made to depend upon a condition precedent—in other words, when no right vests until certain acts have been done—then, also,

a Court of Equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent."

As illustrations of this rule see:

Harper vs. Tidholm, 40 N. E. 575.
Granville Lumber Co. vs. Atkinson, 234 Fed. 424.
Wood vs. McGraw, 127 Fed. 914.
Waterman vs. Banks, 144 U. S. 394, 36 L. Ed. 479.
Bartlesville Co. vs. Hill, 121 Pac. 208.

In Davis vs. Gray, 83 U. S. 203, 21 L. Ed. 447, it is said:

"There is a wide distinction between a condition precedent, where no title has vested, and none is to vest until the condition is performed, and a condition subsequent operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interfere and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained."

In Clarno vs. Grayson, 46 Pac. 426, Judge Wolverton, then on the Oregon Supreme bench, discusses this matter at length. He states among other things:

"If the right acquired by the terms of the contract is simply a right to acquire a right or an interest in the subject matter of the contract, it is not then a question of the forfeiture of any vested right in the property or a divestiture of title, whether termed legal or equitable, but a question of the enforcement or non-enforcement of a stipulated personal right or privilege. The privilege of acquiring a vested, equitable right must be distinguished from the right."

In People vs. Center, 6 Pac. 481, the California Supreme Court had under consideration an action by the state to quiet title in certain lands which were being reclaimed by various individuals who sought to acquire title by complying with the state enabling act, which contemplated the reclamation of the land within three years. The Court states:

"The appellants contend that if they and their associates have not the legal title, yet by reason of expenditures on the lands, they have acquired an equity which should protect their possession, as against any proceeding *in a Court of Equity*. It is said the present suit is to enforce a forfeiture, and that equity will not entertain a bill to declare or enforce a forfeiture. * * * But the action is not to forfeit any rights of the defendants. It is an action under Sec. 738 of the Code of Civil Procedure. It is true, a Court of Equity does not favor forfeitures. It will not aid in divesting an estate. It may interfere to prevent the divesting

> of an estate. But here there is no question of forfeiture. By the terms of the agreement the whole of the work required was a condition precedent, and a Court of equity will not, by its decree, give an estate which has never vested."

In all the cases where the equitable rules relative to forfeitures have come up for discussion, it will be found that an estate or interest has become vested, or, if not, that something of value, whether money or property, has been parted with, or valuable improvements have been made by the party against whom the breach of the condition is being urged. There is something of substance, concrete and tangible, that the Courts can put their fingers on. Even in such cases Courts of Equity do not disregard the contract which the parties themselves have made, nor do they capriciously interfere to relieve parties from the consequence of their own covenants.

But in the case at bar, there is nothing of substance which would invoke in any of its forms the maxim that forfeitures are not favored. The defendant neither has forfeited nor is he called upon to forfeit anything. He has not parted with anything, nor has the plaintiff received anything. True, he testified on the trial that he had at one time purchased some supplies to be consumed on the ground, and at another time had bought a gasoline hoist for use there. Aside from the fact that the correspondence does not bear out the claim that he bought these things for use on the Daly property, it is certain that he never sent them there and that he still has them.

Long, under the contract, obtained the privilege of acquiring an interest in the property. It follows from what has been said that the only question in the case is whether that privilege is still available and open to him. If it is, then the contract, on the assumption that it is a complete instrument, affords a defense to the action. And the question as to whether that privilege is still open to him is purely a question of contract, having no relation to the equitable attitude toward forfeitures. Further than that, the burden is on the defendant to prove that the contract is still operative. As stated in People vs. Center, supra:

> "The *onus* was on the defendants to show that they should be relieved of the alleged 'forfeiture', or rather that they should be relieved of the consequences of a failure to execute their contract according to its terms."

Long agreed to begin work not later than October 1, 1918, and at all events not later than October 1, 1919. This time was by the plaintiff extended for one year. It was also provided that if Long should default in any one or more of the provisions of the contract by him agreed to be observed and performed, then his rights in the premises should at once cease, and Daly should be entitled to treat the contract as terminated. These conditions were inserted for the benefit of Daly. They were perfectly lawful conditions and ones which Daly had a right to impose. Long accepted them as an integral part of the contract, and agreed to be bound by them. These provisions the Court has no

right to disregard and by ignoring them make a contract for the parties different from that which the parties made for themselves.

It is perfectly obvious that Long is in default. He did not perform, nor did he commence or tender performance, either within the time limited or afterwards. Nor was performance on his part prevented by the act of the plaintiff. It remains only to inquire whether the plaintiff waived performance. If performance was not waived by the plaintiff, then the latter was clearly within his rights in treating the contract as at an end.

The question of waiver then is the only question in the case and it is to be considered on its own merits—not examined through glasses colored with the desire of the Court to relieve from an unfavored forfeiture.

IV

The Court erred in holding as a matter of law that the appellant waived performance on the part of the appellee of the terms of the contract between the parties concerning the development of the property in controversy.

It is a universally established principle that estoppel is an indispensable element of waiver. Where there is no estoppel, there is no waiver.

Frankfort-Barnett Co. vs. Wm. Prym Co., 150 C. C. A. 223.

Hampton Stave Co. vs. Gardner, 83, C. C. A. 521.

Williams vs. Neely, 67 C. C. A. 171.

Maginnis vs. Knickerbocker Ice Co., 112 Wis. 385.

Ludlow vs. N. Y. Etc. Railway Co., 12 Barb. 440.

Underwood vs. Insurance Co., 57 N. Y. 505.

Dickens vs. Sexton, 43 N. Y. S. 167.

New York Life Insurance Co. vs. Eggleston, 96 U. S. 572, 24 L. Ed. 841.

Globe Mutual Insurance Co. vs. Wolfe, 95 U. S. 326, 24 L. Ed. 387.

Big Six Development Co. vs. Mitchell, 70 C. C. A. 569, 138 Fed. 279.

"An estoppel is an indispensable element of waiver. Where there is no estoppel there is no waiver, and the undisputed evidence is that the requisite elements of an estoppel are lacking. They are: ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and the innocent and detrimental change in reliance upon that representation."

Hampton Stave Co. vs. Gardner, supra.

"The essence of waiver is estoppel. Where there is no estoppel there is no waiver."

Williams vs. Neely, supra.

"The doctrine of estoppel lies at the foundation of the law as to waiver."

Underwood vs. Insurance Co., supra.

"There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby."

Frankfort-Barnett Co. vs. Wm. Prym Co., supra.

The cases stating this principle might be multiplied indefinitely.

It follows that there was no waiver of commencement of performance on the part of Long, unless Daly, by his words or conduct, has estopped himself from setting up the default.

As heretofore pointed out, the Trial Court seems to have been greatly influenced by the attitude of Daly as expressed in the correspondence between the parties in February and March, 1920 (Trans. pp. 36-40). In this correspondence Daly endeavored to persuade Long that it would be to the advantage of both, in view of their limited means and the desire of Long to install machinery, mutually to abandon the contract. Long, however, positively and unequivocally refused to abandon the enterprise, asserting his desire and his intention of proceeding under the agreement. The subject was not again mentioned between them, but when the correspondence was resumed in July (Trans. pp. 40-41) it is assumed by both parties that work under the contract would be proceeded with in accordance with its terms.

A contract may be terminated by the mutual agreement of the parties to rescind. But where one party makes overtures looking toward a mutual rescission, or expresses a desire to rescind, the other party is not thereby relieved from performance unless he acquiesces in the rescission. He cannot stand on the contract and at the same time refuse to perform it on the theory that he is relieved of performance because the other party at one time expressed a desire to rescind. Nor

can his vigilance with respect to his own performance be safely relaxed because the other party may have become discontented with the terms of the contract, even to the extent of manifesting a desire to be relieved of its obligations.

It is evident that both Daly and Long took the view that Daly had granted Long a year's extension of time, and that this extension expired October 1, 1920. In his letter of September 27, 1920 (Trans. p. 42), Long, after explaining the failure of his plans, states:

> "However, if you want to work there this winter go ahead and put on a man and hire him as reasonable as you can and start in October 1st and send in the bill to me at Baker and I will pay my part, according to my agreement with you, which is on record. * * * And case you don't want to work there you can give me an extension of time and I will file same."

In his reply (Trans. pp. 43-44), written October 2, 1920, Daly states:

> "As to hiring a man, I cannot work him to advantage. * * * I do not want to grant you an extension of time on the present agreement. * * * I will give my reason. Somebody might want an option, a lease or a bond. I could not give either if the property is tied up."

It is perfectly apparent that the parties understood that Long must commence performance October 1, 1920, unless Daly should grant him a further extension. This

practical construction given the contract by the parties themselves is, of course, controlling. Indeed, no other construction is possible unless it be assumed that Daly had intended to grant an indefinite and permanent extension.

It is clear that Long defaulted as the result of his failure to commence work at the time indicated. If Daly waived this default, it must have been by virtue of the terms of his letter of October 2, 1920. If Daly is estopped, the estoppel must be predicated upon this letter.

Taking that letter by its four corners, it is capable of but one construction. Daly refuses to put on a man in Long's place, as requested. He declines to grant an extension of time on the present agreement. He gives his reason for so doing. If he were to give Long further time, the property would remain tied up under the agreement. This situation he is determined to avoid. He desires to be free to make other arrangements relative to the development or disposition of his property, should the opportunity present itself.

No estoppel to claim the benefit of Long's default can be predicated upon this letter. The elements of an estoppel are wholly lacking. There was no misrepresentation by Daly. There was no change of position by Long. Long could not have been led to believe, from the language of this letter, that Daly had granted him a further extension of time. The letter could not have induced him to conclude that further delay on his part would not be regarded by Daly as an abandonment of the contract. It could not have induced him to believe

that Daly would put on a man in his place and rely upon Long's promise to pay the bill.

It is true Daly intimates in this letter that if, at some future time, Long should find himself in position to commence work upon the property, and Daly had meanwhile made no other disposition of the claims, then Daly would be willing to consider the making of another contract with Long. Should such situation thereafter arise, Daly would be entitled to credit for the assessment work which he had been doing. Long, however, owes him nothing under the existing agreement, and of that agreement there would be no further extension.

This letter is couched in mild and courteous language, but in all essential particulars there is no mistaking its upshot. It cannot be held to have given rise to an estoppel against Daly unless it was reasonably calculated to induce Long to believe that he might lie idle and inert for an indefinite period and still have preserved to him all his rights and privileges under the contract.

If Daly had not written this letter—if he had not replied to Long's communication of September 27, 1920—it may be assumed that his previous attitude with respect to the enterprise may have been such as to induce Long to believe that he might safely delay commencement of performance on his part. It may also very well be that, under the circumstances, Long's privileges under the agreement were not absolutely terminated by his failure to commence work on October 1, 1920, and that he had a reasonable time after the

receipt of Daly's reply in which to comply with his contract. But certainly upon receipt of Daly's letter, it became incumbent upon Long to act with reasonable promptness. We would expect him promptly to go to Silver City and either commence work or persuade Daly to grant him an extension of time. We might expect him to send money to Daly with which to hire a man in his place. The very least that must have been expected of him, should he have desired to keep the contract alive, was a prompt expression of his views of the situation or of his intentions relative to the carrying out of the agreement.

The fact is that Long did nothing at all. He did not even reply to Daly's letter. To all outward appearances he completely abandoned the enterprise.

It is to be gathered from his letters that Long took a peculiar and wholly unauthorized view of Daly's obligations under the contract. In his letter of September 30, 1919 (Trans. p. 35), Long states:

> "I am ready to fulfill my agreement with you and go ahead with the development work on the Daly group of quartz mining claims according to our agreement on file, County Recorder's office. providing you wish to commence work October 1. You can put on a man and I will pay the bill."

In his letter of February 18, 1920 (Trans. p. 38), he states:

> "I wrote you September 30 that I was ready to fulfill my agreement with you, filing a copy of the same in the office of Co. Recorder of Owyhee

> County instructing you to put on a man and proceed with the work and I would pay the bill."

In his letter of September 27, 1920, in the quotation heretofore given, he states:

> "If you want to work there this winter go ahead and put on a man and hire him as reasonable as you can and start in October 1st and send in the bill to me at Baker and I will pay my part, according to my agreement with you, which is on record."

In this connection Long no doubt has reference to the clause in the contract commencing at the bottom of page 16 of the Transcript, in which it is recited that either party shall have the right to carry on the enterprise, even though the other fails or refuses to do so, in which event the party failing to perform "shall repay the reasonable and proper price for such party". Long appears to take the attitude that on his own failure to proceed Daly was under the necessity of proceeding for him.

Daly never acquiesced in this construction of the contract. In his letter of October 13, 1919 (Trans. p. 36), he states:

> "I did not put a man to work as requested. I will give you an extension of time to carry out the agreement."

In his letter of October 2, 1920, he also indicates his refusal to put on a man in Long's place. It is obvious that Daly was under no obligation to carry out Long's part of the contract, as well as his own. It is elemen-

tary that a party to an agreement cannot give it an unauthorized construction, and then take refuge behind such construction. Yet that is apparently the precise thing that Long has attempted to do in this case. He appears to say to Daly: "I am carrying out my contract because I am directing you to put on a man in my place and send me the bill." Indeed this is the attitude which counsel for Long himself took in the trial of the case in the lower Court.

Daly, under the circumstances, was fully justified in assuming that the contract had been abandoned by Long and he acted accordingly. He remained on the property until the middle of November following (Trans. p. 48), and thereafter seems to have treated the contract as abandoned.

Some seven or eight months after his receipt of Daly's letter of October 2, Long learned of good ore being encountered in or near the Daly group. This news seems to have galvanized him into activity, and he went to Silver City, remaining over night (Trans. p. 54). On June 28, 1921, he wrote Daly asking how "my interests in these properties" have been protected.

In Waterman vs. Banks, 144 U. S. 394, 36 L. Ed. 479. it is stated:

> "In Taylor vs. Longworth, 39 U. S. 172, the principle was recognized that time may be of the essence of a contract for the sale of property, not only by express stipulation of the parties, but from the very nature of the property itself. This principle is particularly applicable where the property is of such character that it will be likely to undergo

> sudden, frequent or great fluctuations in value. In respect to mineral property it has been said that it requires, and of all properties, perhaps, the most requires, the parties interested in it to be vigilant and active in asserting their rights."

It follows that the contract between these parties affords no defense to this action.

First, because no interest in the title has become vested in the appellee.

Second, because it is incomplete and unenforceable in equity.

Third, because Long is in default under it, and his default is of such a character and his lack of diligence is so gross and palpable that he has no standing whatever in equity; and

Fourth, there was no waiver by Daly of Long's default, because in Daly's conduct and attitude with respect to the default the elements of an estoppel are lacking.

The decree appealed from in effect relieves the defendant of the necessity of performing his contract. It recognizes an undefined interest in the property as already vested in the defendant, contrary to the plain terms of the agreement. And it leaves the plaintiff helpless, his property unmarketable, and himself at the mercy of the defendant.

The judgment should be reversed.

Respectfully submitted,

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